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Foreword

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United States Court of International Trade

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As the baby boom generation is replaced by the millennials as the largest age group in the United States, the federal court community is noticing the change in the composition of the federal judiciary. Like my own court, where four of nine active judges have moved to senior status in the past few months and we have two recently appointed colleagues,[1] the U.S. Court of Appeals for the Federal Circuit has welcomed three new jurists: Judges Richard G. Taranto, Raymond T. Chen, and Todd M. Hughes. Further, Judges Kathleen M. O'Malley, Jimmie V. Reyna, and Evan J. Wallach joined the Circuit in the recent past.

This change in the composition of the court is noted in the patent law overview article authored by members and associates of the firm of Niro, Haller & Niro, *2014 Patent Law Decisions on Key Issues at the Federal Circuit.* The comprehensive article goes on to cover many procedural and substantive issues that have occupied the court—particularly those that have drawn attention from the U.S. Supreme Court. It analyzes the interplay between the Federal Circuit and the High Court, particularly with respect to patent eligibility for software and business method patents. That particular topic is given more detailed treatment in the Note, *The Federal Circuit and* Ultramercial*: Software and Business Method Patents Tumble Further down the Rabbit Hole,* by Mark Patrick. Whatever the views of the various members of the Circuit, it seems clear that applying Supreme Court precedent to subsequent cases involving software and business methods is no simple task.

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1. Taking senior status were former Chief Judges Gregory W. Carman, Jane A. Restani, and Donald C. Pogue as well as Judge Richard K. Eaton. Judges Mark A. Barnett and Claire R. Kelly joined the court in 2013.

I hope I may be forgiven for tip-toeing into the current year, but recent Supreme Court decisions seem particularly relevant to one of the articles in this volume. In the case of *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*,[2] the Supreme Court carved out subsidiary fact determinations in *Markman*[3] claim construction hearings for a clearly erroneous standard of review. One of the tenets of the contract law overview article in this volume is that the trier of fact is given insufficient deference by the Federal Circuit in contract cases. As a sometimes trier of fact, I applaud the standard applied to such fact determinations in *Teva Pharmaceuticals*, and perhaps that standard should be applied expressly to subsidiary fact determinations by the Court of International Trade in the construction of tariff provisions, which share many attributes with patent claims. Further, rejecting the view of the Federal Circuit[4] and continuing to come down on the side of viewing an arguably legal issue as a factual one, the Supreme Court in *Hana Financial, Inc. v. Hana Bank*[5] held equivalency for tacking of trademarks is a factual matter. Perhaps the handwriting is on the wall: when in doubt, treat the question presented as one of fact.

The previously noted government contracts article posits that while some critics have argued that the Circuit is biased in favor of the government in the contract arena, the empirical data does not reflect that critique. Empirical analysis, which the authors undertake, is always a controversial approach when judicial decisions are the subject, but it is also always intriguing. Greater success by the government might seem to signal bias, but, as the article notes, one would expect appellees, including the government, to succeed more often than not. I also might ask, "Is the government cautious in bringing contract case appeals, or does the law itself, rather than the court, tilt toward the government?" For example, if statutory interpretation is at play, the government's reasonable interpretation of an ambiguous statute will prevail.

The authors expanded the database for their empirical study by examining appeals from 2010 to 2014, but no bias was demonstrated to the authors' standard. As to 2014, the authors also undertook a case-by-case analysis, attempting to determine whether excessive formalism led to unacceptable results. The answer seems to be that the Circuit did well in straightening out some precedents that have

2. 135 S. Ct. 831 (2015).

3. *See generally* Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996).

4. *See* Van Dyne-Crotty, Inc. v. Wear-Guard Corp., 926 F.2d 1156 (Fed. Cir. 1991), *abrogated by* Hana Fin., Inc. v. Hana Bank, 135 S. Ct. 907 (2015).

5. 135 S. Ct. 907 (2015).

come under fire while reaching conclusions that seem fair to the authors. As a judge, I prefer to think that the authors are correct. However flawed we are, most judges search for a result that seems both fair and correct under the law. That we fail occasionally would also seem to be expected overall. I can only thank the authors for undertaking this task and providing so much analysis. It is often fairly easy to say what happened. Finding the why is considerably more difficult.

Saying what the law is or what the important developments in the law are perhaps is not quite so easy an undertaking in the trade area. After 200 years of customs practice, how to construe a tariff term is still a topic of dispute. The authors of *2014 International Trade Law Decisions of the Federal Circuit* concentrated on the cases directly involving classification and took particular note of *Deckers Corp. v. United States*,[6] a case that others might have overlooked. The case is interesting in its attempt to conform stare decisis jurisprudence in this area with general stare decisis principles. As construction of a tariff provision is said to be a legal determination,[7] stare decisis principles and procedure in the Circuit should apply. In *Deckers*, the Circuit made note of what should be done after a binding tariff interpretation decision with those pesky factual determinations that are subsidiary to tariff construction, for example, industry practice.[8] The court did distinguish such subsidiary fact questions from the ordinary factual determinations that arise in determining whether goods fit into a classification, as properly construed.[9] If this case signifies an overall attempt to keep Federal Circuit jurisprudence in the mainstream, it seeks a laudatory goal.

Nothing in customs law, however, created quite the stir as did the Federal Circuit's decision last year in *United States v. Trek Leather, Inc.*,[10] which addressed who could be liable for negligent importations. Whether the Circuit expanded the persons who can be liable or merely clarified the law, much ink has been spilled on the subject. In the trade area and the area of section 337 investigations as opposed to traditional customs law, I did not perceive that the authors considered any case particularly unusual. I leave to others to

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6. 752 F.3d 949 (Fed. Cir. 2013).

7. LeMans Corp. v. United States, 660 F.3d 1311, 1315 (Fed. Cir. 2011); Universal Elecs. Inc. v. United States, 112 F.3d 488, 491 (Fed. Cir. 1997).

8. *Deckers*, 752 F.3d at 966.

9. *Id.* at 956.

10. 767 F.3d 1288 (Fed. Cir. 2014), *petition for cert. docketed sub. nom* Shadadpuri v. United States (U.S. Feb. 13, 2015) (No. 14-986).

read between the lines. In the area of adverse facts available, the authors did note the potential negative collateral effects on the fully cooperative in unfair trade cases. This is one aspect of the problem of calculating rates for the large number of respondents that Commerce is unwilling to individually review. The authors, however, did not comment on the possible difference in this area between countervailing and antidumping duty cases. In the former, the investigated government's failures may have more direct impact on cooperating respondents than in antidumping cases, where the producer companies are the focus.[11]

2014 Trademark Law Decisions of the Federal Circuit by Jonathan M. Gelchinsky discusses thirteen cases, only six of which are precedential. One of these is *In re Geller*,[12] which, among other things, continued the theme of how to review subsidiary fact determinations. In that case, the overriding legal issue was disparagement and the Trademark Trial and Appeal Board's underlying factual findings were to be reviewed for substantial evidence.

Of significance to the author is *Southern Snow Manufacturing Co. v. SnoWizard Holdings, Inc.*[13] Regarding an issue labeled as first impression in the Circuit—whether a claim for fraud under section 38 of the Lanham Act may be asserted only on the basis of a registered trademark—the Court answered "yes." The decision, however, is not precedential.

The Downfall of Auer *Deference: Veterans Law at the Federal Circuit in 2014* by Victoria Hadfield Moshiashwili not only provides an in depth discussion of the relevant 2014 decisions, but as the title suggests, also attempts to ferret out some overall themes revealed by the 2014 decisions. In particular, it explicates the controversy now surrounding deference to agencies' interpretations of their own regulations[14] and why the Department of Veterans Affairs's interpretations may be particularly vulnerable.

Finally, after more than thirty years of having the privilege of sitting on the Court of International Trade and after many years of serving

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11. *Compare* Fine Furniture (Shanghai) Ltd. v. United States, 748 F.3d 1365 (Fed. Cir. 2014) (countervailing duties), *with* Mueller Comercial de Mexico, S. de R.L. de C.V. v. United States, 753 F.3d 1227 (Fed. Cir. 2014) (antidumping duties).

12. 751 F.3d 1355 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 944 (2015).

13. 567 F. App'x 945 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1416 (2015).

14. In *Auer v. Robbins*, the U.S. Supreme Court held that an agency's interpretation of its own regulations is controlling unless it is "plainly erroneous or inconsistent with the regulation," subject to the limits imposed by any relevant statutes. 519 U.S. 452, 461 (1997).

on various district and circuit courts, I can say it is quite interesting to observe the changes in the federal courts as my generation moves on. Of course, many things remain the same. One is the pleasure of discussing the law with old colleagues, as well as new, and reading fine articles authored by the members of the bar who are so willing to use their valuable time to aid our understanding of the law.